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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WENDY MARIE BARNO et al., Plaintiffs and Appellants, v. THE COPLEY PRESS, INC. et al., Defendants and Respondents.	D043150 (Super. Ct. No. GIN 020218)

APPEAL from a judgment of the Superior Court of San Diego County, Michael M. Anello, Judge. Affirmed.

Allan Barno was killed in an automobile collision with Christy David-Speckhard (David). Allan Barno's widow, Wendy Barno, and their sons, David and Alexander, (collectively the Barnos) filed a wrongful death lawsuit against David; The Copley Press, Inc., dba Union-Tribune Publishing Company (Copley), and newspaper distributor Herbert Plemel, as David's employers; and the County of San Diego (County). In bifurcated bench and jury trials, the jury found David was an independent contractor.

The court found County was not liable for negligent design of the road where the accident occurred. The Barnos contend the court erred (1) by denying their in limini motion and their motion for a directed verdict, which both sought a ruling David was Copley's employee as a matter of law; (2) by refusing to give three special jury instructions; and (3) by determining County established the elements of design immunity under Government Code section 830.6.[1] We affirm.

FACTUAL AND PROCEDURAL HISTORY

On May 4, 2001, David was driving home on Bear Valley Parkway in Escondido, after having completed her newspaper delivery route. When David realized she was veering off the eastern side of the road and heading toward a large tree, she turned sharply to the left and traveled across a dike that ran along the eastern side of the road. Because she turned too sharply, she lost control of her car and hit Mr. Barno's vehicle, which was traveling southbound. David admitted she caused the accident and pled guilty to vehicular manslaughter.

On February 1, 2002, the Barnos filed an action against David, Copley and Plemel for wrongful death and emotional distress, and against County for negligent design. Copley filed a motion for summary judgment in which Plemel joined, contending David was an independent contractor as a matter of law and, even if she were an employee, there was no liability under the coming and going rule. County filed a motion for

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1 All further statutory references are to the Government Code unless otherwise specified.

summary judgment, contending there was no dangerous condition as a matter of law and County was entitled to design immunity under Government Code section 830.6 The court denied both summary judgment motions, ruling there were triable issues of fact as to all of the issues raised. The matters went to trial.[2]

After all evidence had been produced, the Barnos moved for a directed verdict on the ground that David was Copley's employee either directly or through Plemel. The court denied the motion, stating the law requires the jury to decide whether a person is an employee or an independent contractor when the facts support inferences as to both. The court found the facts supported an inference David was an independent contractor because, at minimum, both Plemel and David testified they believe they are independent contractors. The jury returned a special verdict stating that David was an independent contractor. The Barnos then moved for a judgment notwithstanding the verdict, which the court denied.

After the bench trial, the court concluded County had established the elements of the affirmative defense of design immunity under section 830.6. The Barnos requested modification of the court's tentative decision and its initial statement of decision. The court filed an amended statement of decision on June 24, 2003. The court also denied the Barnos' motion for a new trial. Judgment in favor of Copley and County was entered on August 20, 2003.

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[2] Prior to trial, David admitted liability and settled the Barnos' civil claims against her, and the Barnos and Plemel entered into a stipulated judgment against Plemel and a covenant not to execute.

DISCUSSION

I. *Independent Contractor versus Employee*

The Barnos argue, in effect, that David and Plemel are Copley's employees, rather than David being an independent contractor of Plemel, and in turn, Plemel being an independent contractor of Copley.

"Whether a person is an employee or an independent contractor is *ordinarily a question of fact* but if from all the facts only one inference may be drawn it is a question of law." (*Brose v. Union-Tribune Publishing Co.* (1986) 183 Cal.App.3d 1079, 1081 (*Brose*), italics added.)

" 'An "independent contractor" is generally defined as a person who is employed by another to perform work; who pursues an "independent employment or occupation" in performing it; and who follows the employer's "desires only as to the results of the work, and not as to the means whereby it is to be accomplished." The most significant factor in determining the existence of an employer-independent contractor relationship is the right to control the manner and means by which the work is to be performed. "If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established." ' " (*Millsap v. Federal Express Corp.* (1991) 227 Cal.App.3d 425, 431.)

In determining the right to control, "[i]t is not the fact of actual interference with the control, but the right to interfere" that turns the relationship into one of employer-employee. (*Brose*, *supra*, 183 Cal.3d at p. 1082.) "The real test has been said to be 'whether the employee was subject to the employer's orders and control and was liable to

be discharged for disobedience or misconduct; and the fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it.' [Citations.] 'Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so.' " (*Burlingham v. Gray* (1943) 22 Cal.2d 87, 99-100 (*Burlingham*).)

Other tests to determine whether a worker is an independent contractor or an employee, which are considered secondary in importance to the right of control, include: " '(a) whether or not the one performing service is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or workman supplies the instrumentalities, tools, and the place of work for the persons doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by time or by the job; (g) whether or not the work is a part of the regular business of the principal; (h) whether or not the parties believe they are creating the relationship of employer-employee.' " (*Isenberg v. California Emp. Stab. Com.* (1947) 30 Cal.2d 34, 39.)

At trial, David testified she believes she is an independent contractor. She uses her own car to deliver the newspapers. Plemel determines her monthly pay based upon the number of papers she delivers as reported to him by Copley plus a bonus he determines. Plemel pays her with a personal check and does not withhold income or

social security taxes from her pay, nor does he offer her employee benefits. Plemel sends David an IRS form 1099 for income tax purposes.

Plemel testified he has been contracting with Copley to distribute newspapers as an independent contractor for 25 years. He has his own letterhead, which includes his name and telephone number and the words "independent distributor," and he has a tax identification number for his business. Plemel does not bill Copley for his services. Each month, Copley provides Plemel with an itemized statement and then sends him a check based upon the information in the itemized statement.

Plemel rents a cubicle from Copley in the Union Tribune Distribution Center (Distribution Center), in which his carriers prepare the newspapers for delivery. Plemel locks the cubicle with his own lock and has equipped it with a coffee pot, microwave and refrigerator. Copley provides the tables, chairs and carts required to prepare the newspapers for delivery.

Plemel hires carriers to deliver the newspapers without Copley's approval. Plemel did not tell Copley he had hired David; the first time he spoke with Copley employee Richard Conahan about David was when he reported this accident. Plemel contracts with the carriers using a form contract given to him by another distributor, which he found in the Distribution Center. The carriers are responsible for providing their own vehicles and Plemel does not reimburse them for the expenses associated with those vehicles.

Copley employee Richard Conahan testified he manages the Union-Tribune newspaper distributors in the north county inland area, some of which are independent contractors. Each year, Conahan negotiates a one-year distribution contract with Plemel

about 30 days before the expiration of the old contract. One of the items he negotiates is the rent Plemel pays Copley for the use of the cubicle. However, there is no rental contract for the cubicles distributors rent; Copley merely debits the distributors for the rent on the monthly statement drawn up by Copley's circulation accounting department, which provides the number of newspapers delivered each month. Based upon that statement, Copley sends each distributor a check for his services.

Conahan also testified Copley solicits subscribers directly, maintains a subscriber database, and divides the subscribers into territories served by distributors. The distributors then divide up their territories into routes. Subscribers report any complaints directly to Copley, rather than to the distributors. Copley bills most subscribers directly, although about 10 percent of the subscribers pay the carrier or the distributor.

Conahan further testified the independent distributors set their own hours and determine how many routes and carriers to use. Conahan has no relationship with the carriers and had never heard of David until Plemel told him about the accident.

The contract between Plemel and Copley, which was admitted into evidence, provides Plemel is an independent contractor: "Contractor [Plemel] represents and warrants that it owns and operates an independent business enterprise and exercises sole and exclusive control over the manner and means employed in operating its business. As an independent contractor, Contractor is solely responsible for (1) obtaining and maintaining vehicles used to perform delivery services; (2) paying all expenses incurred in providing delivery services; (3) selecting and controlling the means used to perform delivery services; (4) hiring, compensating, controlling and discharging persons utilized

to provide delivery services; and (5) satisfying all tax obligations." The contract requires Plemel (1) to deliver newspapers by 5:30 a.m. on weekdays and 7:00 a.m. on weekends and holidays; (2) to devote his best efforts to maximizing delivery and collections; (3) to maintain an subscriber list that may not be disclosed to anyone other then Copley and that must be surrendered to Copley when contract is terminated; (4) to not transfer the distributorship without Copley's consent; (5) to not distribute any other newspaper without Copley's consent; and (6) to provide workers compensation insurance, general liability insurance and comprehensive automobile insurance that covers owned and unowned vehicles used by Plemel, his employees and his agents. The contract includes a fee schedule, listing the amount Copley pays Plemel for each delivery of the Union-Tribune and for each delivery of other newspapers distributed by Copley; fees for making collections from subscribers; and a monthly service incentive fee. Either party can terminate the contract upon 30 days notice and Copley can terminate the contract for a material breach without notice.

The contract between Plemel and David, which was admitted into evidence, provides David "owns and operates an independent business enterprise and is not an employee of the Distributor [Plemel]." The contract provides David must (1) deliver newspapers by 5:30 a.m. on weekdays and 7:00 a.m. on weekends and holidays; (2) "make every reasonable effort to retain existing subscribers on route and to increase the sale of subscriptions to The San Diego Union-Tribune"; and (3) not disclose the subscriber list, which is owned by Copley, to anyone other than Distributor or Copley; and (4) surrender the subscriber list to Distributor when the contract is terminated. The

contract also (1) provides David is an independent contractor; (2) requires David to perform safely while at the Copley Distribution Center; (3) provides a fee schedule under which David is paid for each newspaper delivered; (4) requires David to pay her own "state, federal, social security, state disability income and unemployment taxes;" and (5) does not provide for employee benefits from Distributor. Either party may terminate the contract on thirty days notice or immediately, if there is a material breach.

A. *Directed Verdict*

The Barnos contend the court erred by denying their motion for a directed verdict, which is "functionally equivalent to contending there was no substantial evidence to support the jury's verdict . . . ." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630.) We review the court's denial of the motion for substantial evidence, under which "we must consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the judgment." (*Ibid.*)

In order to prove David was Copley's employee, the Barnos would have to prove David was Plemel's employee and, in turn, Plemel was Copley's employee. However, there was substantial evidence David was an independent contractor and not Plemel's employee. David testified she believed she is an independent contractor and the contract she signed provided she was an independent contractor. Her income was based upon the number of newspapers she delivered and not the amount of time she worked. She used her own car to deliver the newspapers and Plemel did not compensate her for her car

expenses. She had the authority to change her route so that she could throw the newspapers out of the right window instead of the left window.

There was also substantial evidence Plemel was an independent contractor and not an employee of Copley. Copley did not have a right to control the means by which the papers were delivered in that Plemel divided his territory into as many routes as he believed necessary; hired carriers without Copley's approval; and determined his own hours. Further, Plemel testified he believed he was an independent contractor and his contract with Copley states he is an independent contractor. His income was based upon the number of papers his carriers delivered and the amount of money he collected, and not by the amount of time he worked. Plemel paid rent for the space he used in the Distribution Center, equipped it with a coffee pot, a refrigerator and a microwave, and locked it with his own lock. Substantial evidence supports the court's denial of the Barnos' motion for a directed verdict.

While we agree that many of the facts that show the exercise of control in *Brose* and *Burlingame* are present in this case, the courts in those cases determined the issue of the worker's status was not a question of law but a triable issue of fact that should have gone to the jury. (*Brose*, *supra*, 183 Cal.3d at pp. 1086-1087; *Burlingham, supra,* 22 Cal.2d at p. 89.) Following those cases, the court properly denied Barnos' motion for a directed verdict.

We are not persuaded by the Barnos' reliance upon *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*) and *Gonzalez v. Workers' Comp. Appeals Bd.* (1996) 46 Cal.App.4th 1584, in which the courts held

workers were employees as a matter of law under the Workers' Compensation Act (Act). The California Supreme Court explained that although the determination of whether a worker is an employee under the Act arises from the common law of respondent superior, the purposes are of the two are "substantially different. While the common law tests were developed to define an employer's liability for injuries caused *by* his employee, 'the basic inquiry in compensation law involves which injuries *to* the employee should be insured against by the employer.' " (*Borello, supra,* at p. 352.) "The Act intends comprehensive coverage of injuries in employment. It accomplishes this goal by defining 'employment' broadly in terms of 'service to an employer' and by including a general presumption that any person 'in service to another' is a covered 'employee.' " (*Id.* at p. 354) Because the definition of an employee is more expansive under the Act than it is for the purposes of determining tort liability, we do not find these cases applicable.

We reject Barnos' reliance on *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864 (*Toyota*), which is distinguishable from this case. In *Toyota,* the court held a settlement was not in good faith because substantial evidence did not support the court's ruling the worker was an independent contractor, even though the contract between the restaurateur and the pizza delivery driver provided that the driver was an independent contractor, who was paid ten percent of his collections and who was to provide his own workers' compensation insurance, pay his own taxes, and provide his own car. (*Id.* at p. 872-873.) The court held the driver was an employee because the restaurateur controlled the hours the driver worked, which pizza he was to deliver to each customer, when and where the pizza was to be delivered, and the amount of money to be

collected from each customer. (*Id.* at p. 875-876.) In contrast, David determined her own hours and changed the order of the customers on her route without permission. Further, unlike the restaurateur in *Toyota*, who could terminate the driver for any reason by giving 24 hours' notice, *id.* at p. 873, Plemel and David had equal rights to terminate the contract for no reason by giving 30 days' notice.

B. *In Limine Motion*

Shortly before trial, the Barnos filed an in limini motion, seeking a ruling that David was an employee of Copley and Plemel as a matter of law. The court held an Evidence Code section 402 hearing in which the parties stipulated that deposition testimony would be read into the record. At her deposition, David testified she was an independent contractor. Plemel hired her without Copley's approval. She signed a contract with Plemel, but she did not read the contract. She was fully responsible for the costs of owning and maintaining the car she used to deliver the papers. She had full latitude as to how to deliver the newspapers within her route, and modified the route the prior carrier had used. She did not own the route, however, and knew she must deliver the papers by a certain time each day. Copley solicited the customers. Customers did not call her if they had a complaint; they called either Copley or Plemel.

David further testified that at the end of the month, Plemel got a report showing the number of weekday and Sunday papers she delivered and the cost of the bags she used. Plemel based her monthly pay on this report and also paid her a bonus that he determined. At the end of the year, Plemel sent her an IRS form 1099.

At his deposition, Plemel testified he had been employed by Copley for about four years and then became an independent distributor. He signed a contract with Copley but never read the contract. Although the contract requires Plemel to have worker's compensation insurance and commercial liability insurance, Plemel never had worker's compensation insurance because he has no employees and he let his commercial liability insurance lapse. Copley determined how much Plemel would be paid and how much rent he would pay for the use of his space at the Copley Distribution Center; Plemel never negotiated these amounts. Copley pays him monthly based upon a master bill that gives the total number and payment for the papers he delivers, as well as the cost of the bags and the rent, which he believes is a percentage of the number of papers he delivers.

Plemel further testified he uses a form contract to define the terms of his relationship with all of his carriers, including David, although he never read that form contract. He does not remember where he got the contract, but he believes he probably got it from another agent. Plemel constructs the routes his carriers use by putting a group of subscribers together.

At his deposition, Copley employee Richard Conahan testified he was upset when he learned Plemel was not carrying commercial liability insurance but decided not to terminate Plemel's contract, although he has terminated distributors in the past Under the distributor's contract, a distributor may not deliver other newspapers without Copley's consent. Copley maintains subscriber information on its computers.

After hearing this testimony, the court denied the motion. The court found the motion similar to Copley's summary judgment motion in which it had already determined

there was a triable issue of fact as to whether David was an independent contractor or an employee.

We review the court's denial of an in limine motion for abuse of discretion. (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639-640.) David's employment status is a matter of fact unless all the evidence and inferences point to only one result. (*Brose, supra,* 183 Cal.App.3d at p. 1081.) Accordingly, the court should have denied the motion unless all of the evidence and inferences required a finding that David was Copley's employee. Evidence supporting an inference that David is an independent contractor includes (1) David's belief she is an independent contractor; (2) David's remuneration based upon the number of papers delivered rather than the number of hours worked; and (3) David's ability to modify her route without permission. The court did not abuse its discretion by denying the motion.

II. *Jury Instructions*

The Barnos contend the court erred by refusing three jury instructions it offered. In order support this contention, the Barnos must show the jury instructions they offered are a correct statement of the law, and are not misleading or incomplete. (*Hardin v. Elvitsky* (1965) 232 Cal.App.2d 357, 372; *Norman v. Life Care Centers of America, Inc.* (2003) 107 Cal.App.4th 1233, 1242.) The Barnos must also show the error was prejudicial. (*Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1156.) However, the Barnos failed to cite any law or make any argument as to why the "refusals of those instructions constituted prejudicial error and grounds for reversal." Appellants waive issues "perfunctorily asserted without any analysis or argument in support . . . ." (*People*

v. Barnett (1998) 17 Cal.4th 1044, 1107, fn. 37.) Accordingly, "we deem [this] claim abandoned for lack of argument." (*McGettigan v. Bay Area Rapid Transit Dist.* (1997) 57 Cal.App.4th 1011, 1016, fn. 4.)

III. *Design Immunity*

The Barnos contend the County was negligent in designing and maintaining the portion of Bear Valley Parkway where the accident occurred due to a dike on the side of the road. The Barnos's theory is that when David lost control of her vehicle, its wheels got trapped in the dike, preventing David from easily correcting the vehicle's path and getting back on the road safely.

The County raised the affirmative defense of design immunity under section 830.6,[3] which allows a public entity to avoid liability for injury proximately caused by a dangerous condition of its property. "The rationale for design immunity is to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design. [Citation.] ' " ' "[T]o permit reexamination in

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[3] Section 830.6 provides in part: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor."

tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested.' " ' " (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 69 (*Cornette*).) In order to establish design immunity, a public entity must prove three elements: "(1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction[4]; and (3) substantial evidence supporting the reasonableness of the plan or design." (*Ibid.*)

At trial, Rudolph Massman testified he had been the County's assistant head engineer at the time the Bear Valley Parkway project was approved in 1970-1971. The original plans for Bear Valley Parkway were approved by County Engineer Howard Taylor, to whom County Board of Supervisors had delegated the authority to approve road construction plans. During road construction, changes are frequently made to original plans because original plans are based upon surveyors' field notes and do not always conform to conditions in the field at the time of construction. Major changes require a change order approved by the Board of Supervisors; minor changes are

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4 Section 830.6 provides the second element can also be established by proving that "such plan or design [was] prepared in conformity with standards previously so approved." The trial court found the County established the second element under both tests. Because we agree substantial evidence supports the establishment of the second element due to prior discretionary approval of the plan, we need not consider the court's additional finding that the dike was built according to previously approved standards.

approved by field engineers, who are the civil engineers in charge of various County projects and who usually have an inspector on each project to insure the contractor's work meets County standards. When a field engineer approves a change to the original plans, County practice requires him to note the change directly on the plans prior to construction. After construction is complete, all approved changes are incorporated into a clean set of plans, called as-built plans. Massman then signs the as-built plans and presents them to the Board of Supervisors.

Massman signed the as-built plans for Bear Valley Parkway on April 14, 1971. One of the changes incorporated into those as-built plans was an 1,800-foot dike extension that resulted in the construction of the dike at the accident site. Massman testified this dike extension did not require a change order. Instead, the on site-inspector would have gotten approval from the field engineer before the dike was constructed.

Massman also testified he was familiar with a document entitled "San Diego County Standards" (County Standards) in effect at the time of the dike extension because he had helped prepare the document. Article IV of County Standards requires developers to construct dikes on "[a]ll streets with asphaltic concrete paving where portland cement concrete curbs are not constructed." The purpose of such a dike is to channel water away from the surface of the road and to prevent erosion of the edge of the road. Although Article IV applies to developers, Massman testified County generally followed County Standards. Further, County would be more likely to build a dike in an urban area, such as the Bear Valley Parkway area.

Licensed civil and traffic engineer Mike Robinson, manager of County's Department of Public Works, Transportation Division at time of trial, testified that the section of Bear Valley Parkway at the accident site was built according to the as-built plans, based upon his careful review of the plans and five inspections of the accident site. The purpose of a dike at that location is to concentrate the flow of water to channel it away from the road and also to prevent erosion of the edge of the road. The two-foot shoulder beyond the dike is a backing designed to protect the road and is sloped to prevent water from eroding the backing.

Robinson opined that placing a dike at the accident scene was reasonable to prevent the water from flowing over the backing material: "So I would prefer to make sure that that water is eliminated in a way that it's not destructive to the road, and in this particular case, because of the slope of the bike lane at least, I know that the water would be running off onto that backing, and ultimately eroding it away." He also opined that a dike in that location complies with County Standards and agreed with the statement: "Erosion prevention is one of the major factors in the design, construction, and maintenance of highways."

County consultant Allen Weber, a licensed civil and traffic engineer, testified it is a very common practice to incorporate changes into the construction of a road, as shown by as-built plans. Based upon his inspection of Bear Valley Parkway, the dike was constructed according to the as-built plans. The purpose of the dike is to prevent the water from eroding the ground under the asphalt, which could cause the asphalt base of the road to collapse. Weber opined it was reasonable and necessary for County to install

a dike at the accident site. Weber also opined the dike was proper according to California Highway Transportation Agency Planning Manual of Instructions (State Planning Manual), which provides: "The main purpose of the dike is to confine drainage only where it is necessary to protect side slopes susceptible to erosion."

After trial, the court issued a statement of decision and an amended statement of decision in which it found County established the defense of design immunity. The court found the element of discretionary approval of the design prior to construction was established because (1) the as-built plans clearly show the dike extension and (2) County standards require a dike at the accident site. The court also concluded Weber's and Robinson's testimony that the dike is necessary to prevent erosion of the side of the road constitutes substantial evidence the design was reasonable.

We review a court's application of the law to disputed facts for substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) "When a trial court's . . . determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted.) Substantial evidence is "evidence . . . 'of ponderable legal significance, . . . reasonable in nature, credible, and of solid value.' " (*Id.* at p. 873, italics omitted.)

The first element of design immunity is the causal relationship between the subject design and the accident. This element may be established by reference to the allegations of the complaint. (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 940-941 (*Grenier*).) The Barnos' complaint alleged a causal relationship between the design of the road and the accident.

The second element of design immunity is discretionary approval of the plan prior to construction. "Discretionary approval simply means approval in advance of construction by the officer exercising discretionary authority." (*Alvarez v. State of California* (1999) 79 Cal.App.4th 720, 734 (*Alvarez*), abrogated on other grounds in *Cornette, supra,* 26 Cal.4th at p. 74, fn. 3.) In *Alvarez*, the court determined the state established this element by relying upon the custom and practice of the state in approving the as-built plans, finding the as-built plans "themselves provide evidence that the project design was given the requisite discretionary approval prior to construction." (*Id.* at pp. 729, 733-734.)

The Barnos contend there was no discretionary approval prior to construction because the dike was not included in the original plans but was instead approved during construction. We disagree because the discretionary prior approval element is met by approval in the field at the time of implementation when the public entity's discretionary approval practices allow such approval. (*Uyeno v. State of California* (1991) 234 Cal.App.3d 1371, abrogated on other grounds in *Cornette, supra,* 26 Cal.4th at p. 74, fn. 3; *Hefner v. County of Sacramento* (1988) 197 Cal.App.3d 1007, abrogated on other grounds in *Cornette, supra,* 26 Cal.4th at p. 74, fn. 3.) Here, County presented evidence

of its custom and practice of authorizing changes in the field. Massman testified field engineers were authorized to approve minor changes in plans because the original plans were based on surveyors' field notes and sometimes needed to be changed in order to conform to conditions in the field at the time of construction. County's custom and practice required such changes be written on the original plans and incorporated into the as-built plans, which Massman then signed and presented to the Board of Supervisors. Massman further testified the dike extension in this case was a minor change that could be approved by a field engineer. Further, under *Alvarez*, the as-built plans are evidence of prior discretionary approval. Accordingly, the as-built plans and the County practice of field engineer approval constitute substantial evidence of prior discretionary approval.

The third element of design immunity requires "substantial evidence upon the basis of which . . . a reasonable public employee could have adopted the plan or design . . . ." (§ 830.6.) Because this element requires only substantial evidence, " 'as long as long as reasonable minds can differ concerning whether a design should have been approved, then the governmental entity must be granted immunity. The statute does not require that property be perfectly designed, only that it be given a design which is reasonable under the circumstances.' [Citation.] Generally, a civil engineer's opinion regarding reasonableness is substantial evidence sufficient to satisfy this element." (*Grenier, supra,* 57 Cal.App.4th at p. 941.)

In this case, civil engineers Weber and Robinson each testified the dike extension was reasonable. Weber testified the construction of a dike at the accident site was reasonable to prevent water from eroding the ground under the asphalt base of the road,

which would cause the road to collapse. Robinson testified that due to the slope of the bike lane, constructing the dike at the accident site was reasonable and necessary to prevent water from eroding the road's backing. We reject the Barnos' contention that Weber's and Robinson's testimony does not provide substantial evidence of reasonableness in that they both erroneously applied Article IV of County Standards — even though Article IV applies only to developers — because Massman testified County generally relied upon these standards when it designed roads, especially roads in urban areas like that surrounding Bear Valley Parkway. Accordingly, there is substantial evidence the design was reasonable.

The Barnos contend the dike extension was not reasonable because its construction at the accident site violates section 7-303.1 of State Planning Manual, entitled "General Policy," which provides in part: "The dike shall not be used on the high side of a superelevation in fill or along any flush flat area alongside the shoulders that can be used for parking or emergency maneuvering." However, the Barnos provided no evidence the dike extension was built along a flush flat area that could be used for parking. Instead, Robinson testified the area was designed to slope in order to prevent erosion. Therefore, substantial evidence supports an inference that section 7-303.1 does not apply.

We also reject the Barnos' contention the design was not reasonable because the elevation and slope of the road directed water across the road and into the dike on the other side of the road. The third element requires only substantial evidence of reasonableness: "We are not concerned with whether the evidence of reasonableness is

undisputed; the statute provides immunity when there is substantial evidence of reasonableness, even if contradicted." (*Grenier, supra,* 57 Cal.App.4th at pp. 939-940; *Wyckoff v. State of California* (2001) 90 Cal.App.4th 45, 51.)

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

IRION, J.